United States Department of the Interior

FISH AND WILDLIFE SERVICE
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IN REPLY REFER TO:

RE/5501c.WK

AUG 27 2003

Memorandum

To: State Director - Bureau of Land Management
Attention: Chief, Branch of Lands and Realty, Alaska State Office

From: Regional Director - Region 7 Rowan W Gould

Subject: State of Alaska's Recordable Disclaimer of Interest Application for the Black River and Other Water Bodies, Yukon Flats National Wildlife Refuge

Pursuant to 43 C.F.R. 1864, the State of Alaska has applied for a recordable disclaimer of interest in submerged lands, between the lines of ordinary high water marks, which lie beneath water bodies of the Black River basin. An estimated 270 linear miles of these water bodies are located within the external boundaries of the Yukon Flats National Wildlife Refuge. The State has applied for the Black River from its mouth to its confluence with the Wood River (a distance of approximately 240 river miles); the entire length of the Black River Slough; Salmon Fork, from its mouth at the Black River to the International Boundary; Grayling Fork, from its mouth on the Black River to the International Boundary; Bull Creek, from its mouth on the Grayling Fork to Section 5, T. 13 N., R. 31 E., Fairbanks Meridian; and all "interconnecting sloughs" of these rivers and streams. The State's application consists of correspondence to the Bureau of Land Management by the Department of Natural Resources Commissioner, Thomas Irwin, dated February 14, 2003, with four attachments (an 11" X 17" map, a 1980 BLM navigability report with cover memorandum, a 1983 BLM navigability determination, and the 2000 9th Circuit Court's Kandik, Nation, and Black River decision). The Service is aware of the 4-page questionnaire dated May 2, 2003, submitted to the BLM by the State to further support its application.

The Service submits comments on three aspects of the State application. The Service believes that "all interconnecting sloughs" of the Black River basin streams are not specifically identified by name, location, legal description, or survey, and therefore, should not be considered for recordable disclaimer. The Service respectfully objects to the State's assertion that the uppermost 12.3 mile reach of the main stem Black River, that lies within Refuge boundaries, is navigable for purposes of issuing a recordable disclaimer. The Service also believes that the State provides insufficient evidence to show that all waters of the lower Grayling Fork that lie within Refuge boundaries, are navigable for purposes of issuing a recordable disclaimer.

A discussion of our concerns is attached. If you have questions or desire further information, please contact Mr. Todd Logan, Regional Chief, National Wildlife Refuge System - Alaska, at 786-3667.

Attachment

cc: Special Assistant to the Secretary for Alaska
Regional Solicitor

Review of BLM Casefile FF-93920

The Service's comments are guided by Federal title navigability case law and guiding opinions of the Office of the Solicitor. The Federal administrative and case law authorities include: *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870), and succeeding Federal title navigability decisions including *Alaska v. United States*, 754 F.2d 851 (9th Cir.1989), *cert. denied,* 474 U.S. 968 (1985) (Slopbucket Lake); *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir.1989), *cert. denied,* 495 U.S. 919 (1990) (Gulkana River); *North Dakota v. United States*, No. 91-2725 (8th Cir. 1992) (Little Missouri River); *Alaska v. United States*, 201 F.3d 1154 (9th Cir. 2000) (Kandik, Nation, and Black Rivers); *Appeal of Doyon, Limited*, 4 ANCAB 50 (December 14, 1979) (Kandik and Nation Rivers); and, *Doyon, Limited,* 5 ANCAB 354 (July 24, 1981) (Grayling Fork and Bull Creek). The three DOI Office of the Solicitor opinions guiding Service comments are Associate Solicitor Hugh Garner's memorandum of March 16, 1976 (Title to Submerged Lands for Purposes of Administering ANCSA), Regional Solicitor John Allen's memorandum of February 25, 1980 (Kandik, Nation Decision on Navigability), and Associate Solicitor Robert Comer's memorandum of March 14, 2003 (Applications for Disclaimers of Interest for Beds of Navigable Waters).

Interconnected Sloughs

The State has applied for a recordable disclaimer for "all interconnecting sloughs" of the Black River, Black River Slough, Salmon Fork, Grayling Fork, and Bull Creek. The Service notes the guidance and instruction of Associate Solicitor Robert Comer's recent memorandum. The Comer memorandum addresses the topic of granting the State waivers of the survey and legal description requirements in the Federal disclaimer regulations. Comer noted that BLM officials must adhere to the regulatory standards of 43 C.F.R. 1864, and he stated specifically, "BLM needs to be certain of the exact identity and location of the particular water body at issue." It is important that water bodies be accurately described so all can know the extent of lands owned by the State, by the United States, or by other parties. Identification of Federally-owned lands within the Refuge is especially important because of the specific purposes for which the Refuge was established and because of the management objectives for refuges generally.

Problems associated with any disclaimer that includes the words "interconnecting sloughs" of the Black River basin waters are compounded by the fact that waters and riparian landscape have not remained static over time. This dynamic riverine environment is characterized by meandering channels that lie adjacent to sloughs and oxbow lakes. Meandering channels are shaped by the fluvial processes of scouring, filling, erosion, and deposition that cause avulsive, accretive, and relictive change that can affect land boundaries. There are places where sloughs now connected to a main stem channel were not connected at some date prior to Statehood (January 3, 1959). The State may not necessarily have acquired title to the lands beneath such slough waters if the slough became connected to the main stem channel through a significant avulsive event.

Further, "all interconnecting sloughs" is a vague, ambiguous, and problematic term. The term is not specific as to the lands that might be disclaimed. Neither the BLM nor the Service can be certain of the location and identity of these water bodies given such an ambiguous and inexplicit description. Ambiguity could be avoided if lands disclaimed beneath navigable waters were described incorporating the term "ordinary high water mark" or its equivalent. For example, a specific water body could be described as, "the submerged lands beneath the X River, from bank to bank, between the lines of ordinary high water, ..." A navigable water body extends from bank to bank within the line of ordinary high water. If a slough is within the lateral extent of a navigable water body, as indicated by the line of ordinary high water, it is necessarily considered a part of that navigable water body. However, if a slough, interconnecting or otherwise, is a distinct and unique water body, its navigability must be assessed as such. The Service believes an explicit description of specific water bodies, by defining their lateral extent by use of the term "ordinary high water," avoids the inherent ambiguity of vaguely defined "interconnected sloughs."

Black River (upper main stem)

The Service respectfully objects to the State's assertion that the uppermost reach of the main stem Black River, within Refuge boundaries, is navigable. For purposes of disclaiming property interests of the United States, the Black River appears to be a non-navigable water body upstream of the Grayling Fork confluence to the Refuge boundary, a distance of approximately 12.3 river miles. The use of the stream for travel has been irregular and unusual, and limited to significant high water events.

In 1980, the BLM recommended the Black River be found navigable from its mouth at the Porcupine River to the confluence of the Wood River. In 1983, the BLM made final navigability determinations for lands selected by Doyon, Limited, and Chalkytsik Native Corporation. However, these BLM determinations did not include lands adjacent to the upper Black River, upstream of the Grayling Fork confluence.

This upper extent of navigability, as identified by the 1980 BLM recommendation, appears to have been based primarily on 1976 BLM easement comments by Fred Thomas on the perceived physical character of the River, and on the general nature of historical boat use in the Black River basin. The BLM concluded that boats ordinarily used on the Yukon River, Porcupine River, and lower Black River, were used on the Black River up to the Grayling Fork confluence. Regarding the Black River, upstream of the Grayling Fork confluence, the BLM stated in its recommendation, "Under the right set of river conditions, these boats may be used as far as the mouth of the Wood River if the need should arise."

The 1976 BLM easement comments by Fred Thomas include the statement that one "can almost always get as far [upstream] as the Grayling River [Grayling Fork where it meets the Black River] with a light boat. Of course if it is a dry summer, the river [Black River] gets pretty low." He characterized travel by light boat on the Black River upstream of the Grayling Fork confluence as,

"not too bad if there is water." He further qualified upstream travel there by writing, "But you have to have a good stage of water to have no trouble." This comment raises the question as to the hydrologic adequacy and frequency of boatable water.

The second and more recent example of testimonial evidence regarding navigability of the upper Black River was provided to the BLM by the State approximately 3 months after it filed its disclaimer application. An insufficiently documented 4-page form, dated May 2, 2003, is titled "Waterbody Use and Observation Questionnaire" and contains comments attributed to John Thomas regarding the Black River, Grayling Fork, and Bull Creek. There is no cover letter to explain the origin of this unsigned form containing handwritten commentary in the first person. The document appears to be telephone interview results recorded by Alaska Department of Fish and Game staff. It includes two specific comments that include that reach of the upper Black River between the Grayling Fork confluence and the Refuge boundary. The most precise comment reads, "Black River above Salmon Fork - myself and others occassionally [sic] traveled as far upstream as the mouth of Wood River [a distance of 100 river miles upstream of the Salmon Fork] with 20-30 foot boats. Inboard and outboard powered."

The limited testimonial descriptions of the Black River upstream of Grayling Fork characterize it as one of "low water" that typically obstructs or impedes passage by light boat due to shallow water levels. The extremely limited stream use, as described in the two testimonials above, are further supported by comments by Harry Thomas, owner of the only Native allotment on the Black River upstream of Grayling Fork. The BLM Native allotment files contain information reporting that he was able to ascend the Black River above Grayling Fork about 6 times in the 18-year period from 1957 to 1975.

Aerial photos and maps of the Black River show its stream channel narrows upstream of the Grayling Fork. The natural flow regime of the Black River is typical of interior Alaska streams that usually have diminishing flows in June, July, and August, following break up and peak flows in May. Summer thunderstorms can cause high water, surge events in localized areas where water levels and water velocities quickly rise and fall.

The Service, based on the evidence above, concludes that the Black River is non navigable upstream of its confluence with the Grayling Fork. The limited nature of the historical use of boats, the physical characteristics of the water body, and the general characteristics of the area indicate this reach of the Black River has not been a highway of boat travel and is not a "highway of commerce." The marked scarcity of natural resources of commercial value in this uninhabited, remotely situated, and climatically harsh locale strongly suggests this stream, with its physical character and navigational impediments, is not susceptible to becoming a commercial corridor. The uncommon use that has occurred appears to have been infrequent, irregular, and unusual due to the stream's low flow and typically unboatable condition.

Grayling Fork (lower main stem)

The State asserts that the entirety of the main stem Grayling Fork is navigable from its mouth on the Black River to the International Boundary. The Service believes that the State has presented the BLM with inadequate evidence for the record to show, that for purposes of disclaiming property interests of the United States, the Grayling Fork is navigable within the external boundaries of the Refuge in T. 15 N., R. 26 E., T. 16 N., R. 26 E., and T. 17 N., R 26 E., Fairbanks Meridian.

In 1976, the BLM determined that the Grayling Fork and adjacent water bodies were non-navigable in lands selected for purposes of conveyance by Doyon, Limited. (See BLM easement case file FF 021779-80; Notice of Proposed Easement Recommendations for Doyon, Limited, by BLM Acting State Director, Robert Arndorfer, November 26, 1976). In 1977, Doyon contested the non-navigability of the Grayling Fork upstream of the Refuge boundary based on the State's earlier determination that the Grayling Fork was navigable. Doyon appealed the BLM's Decision to Issue Conveyance to the Alaska Native Claims Appeal Board (ANCAB). In 1980, the BLM issued its Black River basin navigability report, and recommended that the Grayling Fork be determined navigable. In 1981, ANCAB ruled on Doyon's appeal, finding the Grayling Fork navigable in two townships adjacent to and upstream of the Refuge [*Doyon, Limited,* 5 ANCAB 354 (July 24, 1981)]. The decision made by ANCAB was based upon BLM's recommendation of navigability, that the facts on record met the essential elements of navigability, and that the facts were undisputed. The 1981 ANCAB decision was applicable only to that portion of the Grayling Fork lying within T. 16 N., R. 27 E., and T. 16 N., R 28 E., Fairbanks Meridian.

The evidence of navigability for the Grayling Fork within the Refuge boundaries is limited in quantity and quality. The evidence provided by the State supporting a finding of navigability for the Grayling Fork is limited to the 1980 BLM navigability report and the very recent comments attributed to John Thomas. In 1980, the BLM recommended that the Grayling Fork be determined a navigable water body based on two points articulated in its 1980 navigability report that states:

> "It is recommended that the Grayling Fork to the International Boundary, a distance of approximately 86 miles, be determined navigable. At least one trapper has traveled up the Grayling Fork to the mouth of Bull Creek (rivermile 46). In the spring of 1912, when the water level was high, a launch was taken to a point near Bull Creek. Freight on the launch was then transported by poling boat to the International Boundary."

The 1980 BLM navigability report recounted the 1976 easement comments made by Fred Thomas regarding boat navigation on the Grayling Fork to Bull Creek. He noted that with a good stage of water, one could ascend the stream as far as Bull Creek. Fred Thomas, who is the owner of a Native allotment at the Black River - Grayling Fork confluence, also has said the Grayling Fork is "...not too bad...if there is water." This comment, however, again raises a question of hydrologic adequacy and frequency of boatable water.

The other BLM point supporting its 1980 redetermination of navigability was the assumption that the Grayling Fork was the route of travel boated by the International Boundary Commission's hired launch and poling boats that supplied survey workers on the United States - Canada boundary. However, since the initial navigability determination 23 years ago, historical research indicates that these boats likely ascended the Salmon Fork of the Black River to the boundary, not the Grayling Fork. The Salmon Fork tributary joins the Black River 70 river miles downstream of the point where Grayling Fork joins the Black River. The paucity of valid evidence at the time of the 1980 BLM navigability recommendation for Grayling Fork, consisting of comments by Fred Thomas, suggests that the BLM was correct in its initial 1976 determination. The 1976 Notice of Proposed Easement Recommendations states, "No water bodies [including Grayling Fork and Bull Creek] are considered to be navigable within the selection area."

The recently submitted questionnaire comments attributed to John Thomas, regarding his travel up the Grayling Fork by 20 or 30 foot long motorized boats to the mouth of Bull Creek, does support the State's assertion that the Grayling Fork is navigable. However, the comments related in the questionnaire, described earlier in regard to the upper Black River, lack adequate documentation to be considered evidence for the record.

The Service has concerns about the quality, quantity, and adequacy of evidence that the State has provided to the BLM supporting the navigability of the lower Grayling Fork. The lower stream may be navigable, however, evidence sufficient to issue a recordable disclaimer for the Grayling Fork, not withstanding the 1981 ANCAB decision, has not been presented. An inadequately documented questionnaire and the thin evidence in the 1980 BLM navigability report are insufficient to conclude that the lower Grayling Fork is a navigable water body. The burden of proof is on the State to show that this stream, and other applied for water bodies, are in fact navigable.

The decision and action taken by the BLM in this initial disclaimer application will be precedent setting. The Service is concerned that the information presented by the applicant for the bed of the Grayling Fork is insufficient to meet minimum evidence and navigability criteria standards prior to disclaiming property interests of the United States.